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MAY 01 2007

OFFICE OF PETITIONS

In re Application of :
John Lezdey and Jarrett Lezdey :
Application No. 10/001,311 :
Filed: November 23, 2001 :
Attorney Docket No. 1434-C :
For: Antimicrobial Compositions :

Decision on Petition

This is a decision on the petition under 37 CFR 1.137(a), filed December 26, 2006, to revive the above-identified application.

The petition is **DISMISSED**.

Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted. Any reconsideration request should include a cover letter entitled "Renewed Petition under 37 CFR 1.137(a)." This is **not** a final agency action within the meaning of 5 U.S.C. § 704.

The above-identified application became abandoned for failure to reply in a timely manner to the final Office action mailed June 23, 2004, which set a shortened statutory period for reply of three (3) months. No extensions of time under the provisions of 37 CFR 1.136(a) were obtained. Accordingly, the above-identified application became abandoned on September 23, 2004. A Notice of Abandonment was mailed on February 14, 2005.

A petition under 37 CFR 1.137(a) was filed March 14, 2005.

A decision dismissing the petition was mailed June 26, 2005.

The instant petition was filed December 26, 2006. The instant petition requests revival for copendency with another application. Application No. 11/711,272 is a continuation in part of the instant application.

The instant petition is untimely. The June 26, 2005 decision stated, "Any request for reconsideration must be submitted within TWO (2) MONTHS from the mail date of this decision. Extensions of time under 37 CFR 1.136(a) are permitted." The instant petition was not filed until 18 months after the mailing of the June 26, 2005 decision. Therefore, the petition is dismissed as untimely.

The instant petition fails to establish the entire delay in filing a reply was unavoidable. The petition fails to discuss the issues raised in the prior decision. The prior decision stated,

A grantable petition under 37 CFR 1.137(a) must be accompanied by:

- (1) the required reply,
- (2) the petition fee, and
- (3) a showing to the satisfaction of the Commissioner that the entire delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to this paragraph was unavoidable.

The instant petition lacks item (3).

As to item (3), the showing of record is not sufficient to establish to the satisfaction of the Commissioner that the delay was unavoidable within the meaning of 37 CFR 1.137(a).

"[T]he question of whether an applicant's delay in prosecuting an application was unavoidable must be decided on a case-by-case basis, taking all of the facts and circumstances into account."¹ The general question asked by the Office is: "Did petitioner act as a reasonable and prudent person in relation to his most important business?"²

Application of the standard to the current facts and circumstances

Petitioner must show he treated the instant application the same as a reasonable and prudent person would treat his or her most important business. Petitioner must show the entire delay from September 23, 2004, until March 14, 2005, was unavoidable.

Petitioner suffered an injury on August 7, 2004. Petitioner returned to work on December 3, 2004.

Petitioner implies he was unable to work until December 3, 2004. However, petitioner filed several applications between the date of his injury and his return to the Office.

Application no. 10/935,536 was filed on September 7, 2004.

Application no. 10/951,051 was filed on September 26, 2004.

Application no. 29/214,128 was filed on September 28, 2004.

Application no. 10/099,037 was filed on November 29, 2004.

If petitioner was able to file these applications, why was petitioner unable to file a response and three month extension of time by December 23, 2004? Petitioner has failed to show the instant application was treated the same as petitioner would treat his most important business. Any request for reconsideration under 37 CFR 1.137(a) should

¹ Smith v. Mossinghoff, 671 F.2d 533, 538, 213 U.S.P.Q. (BNA) 977 (1982).

² See In re Mattullath, 38 App. D.C. 497 (D.C. Cir. 1912).

discuss the applications above *and* all applications in which papers were filed by petitioner or Lezdey and Associates between August 7, 2004, and March 14, 2005.

Petitioner returned to the Office on December 3, 2004. With payment of a three month extension of time (\$510), a reply to the final Office action could have been filed as late as December 23, 2004, in order to avoid the abandonment of the application. Petitioner did not file a reply, and petition, until March 14, 2005. Petitioner has failed to demonstrate a reply could not have been filed prior to March 14, 2005. The Office assumes petitioner was capable of preparing a reply after December 3, 2004, since several applications were filed between December 3, 2004, and March 14, 2005.

Application no. 11/006,279 was filed on December 7, 2004.
Application no. 11/010,028 was filed on December 10, 2004.
Application no. 11/010,219 was filed on December 10, 2004.
Application no. 11/018,620 was filed on December 21, 2004.
Application no. 11/021,589 was filed on December 22, 2004.
Application no. 11/030,626 was filed on January 6, 2005.
Application no. 11/030,826 was filed on January 7, 2005.
Application no. 11/041,128 was filed on January 21, 2005.
Application no. 11/065,476 was filed on February 24, 2005.

Petitioner has failed to prove he was incapable of filing a timely reply and has failed to prove the entire delay in the submission of a reply was unavoidable.

Any request for reconsideration should fully discuss *all* papers filed by petitioner with the Office between August 7, 2004, and March 14, 2005. In addition, any such request should fully discuss the extent to which petitioner handled other work-related matters during the relevant time period. For example, was petitioner able to attend any court hearings or file papers with any courts during the time from August 7, 2004, and March 14, 2005?

Petitioner bears the burden of proof. Petitioner has failed to prove the entire delay in the submission of a reply to the final Office action was unavoidable.

Since the instant petition fails to address the issues raised in the prior decision and fails to prove the entire delay was unavoidable, the petition must be dismissed.

Petitioner may wish to consider filing a petition to revive based on unintentional abandonment under 37 CFR 1.137(b). A grantable petition pursuant to 37 CFR 1.137(b) must be accompanied by the required reply (already submitted), the required petition fee (\$750 for a small entity), and a statement that the **entire** delay in filing the required reply from the due date for the reply until the filing of a grantable petition pursuant to 37 CFR 1.137(b) was unintentional.

A version of the form which can be completed online, and then printed and mailed, can be found at <http://www.uspto.gov/web/forms/index.html>. Petitioner can scroll down to form PTO/SB/64

and click on 64a in the second column to the right.

The filing of a petition under 37 CFR 1.137(b) cannot be intentionally delayed, and therefore, must be filed promptly. A person seeking revival due to unintentional delay cannot make a statement that the delay was unintentional unless the entire delay, including the delay from the date it was discovered that the application was abandoned until the filing of the petition to revive under 37 CFR 1.137(b), was unintentional. A statement that the delay was unintentional is not appropriate if petitioner intentionally delayed the filing of a petition for revival under 37 CFR 1.137(b).


Further correspondence with respect to this matter should be addressed as follows:

By mail: Mail Stop Petition
 Commissioner for Patents
 P.O. Box 1450
 Alexandria, VA 22313-1450

By facsimile: (571) 273-8300
 Attn: Office of Petitions

By hand: U.S. Patent and Trademark Office
 Customer Service Window
 Randolph Building
 401 Dulany Street
 Alexandria, VA 22314

Telephone inquiries concerning the instant decision should be directed to Petitions Attorney Steven Brantley at (571) 272-3203.



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